**No. 17-024**

IN THE

# Yuma Indian Nation Supreme Court

THOMAS SMITH & CAROL SMITH,

*Petitioners*,

v.

YUMA INDIAN NATION, YUMA INDIAN NATION ECONOMIC DEVELOPMENT COUNCIL, FRED CAPTAIN, AND MOLLY BLUEJACKET,

*Respondents.*

**On Interlocutory Appeal from the Yuma Indian Nation Tribal Court**

## BRIEF FOR THE RESPONDENT

TEAM 119

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## QUESTIONS PRESENTED

1. Does the Tribal Court have personal and subject matter jurisdiction over non-Tribal members in a suit brought by the Nation when the non-members were contractually providing services to aid the Nation in economic development pursuant to its inherent sovereign powers?
2. Do the Nation, its arm-of-the-Tribe entities, and its employees maintain sovereign immunity from counterclaims in Tribal Court when the counterclaims are beyond the issues brought by the Nation in suit, United States Congress has not relevantly abrogated immunity, and the Tribe has not specifically waived immunity by resolution or in contract?

## STATEMENT OF THE CASE

### Statement of the Proceedings

The Nation brought suit against Thomas Smith and Carol Smith in Tribal Court, claiming that the Smiths had breached their contracts, violations of fiduciary duties, and violations of their duties of confidentiality. The Smiths filed special appearances in trial court and made identical motions to dismiss due to lack of personal and subject matter jurisdiction. In the alternative, the Smiths argued that the trial court should stay the suit until the Arizona federal district court rules on the Tribal Court's jurisdiction over them. The trial court denied these motions.

The Smiths, still filing under special appearances, denied the Nation's claims and counterclaimed for monies due under their contracts as well as defamation for impugning their professional skills. Further, the Smiths impleaded and made identical counterclaims against the Economic Development Corporation (EDC), and EDC's CEO Fred Captain and EDC

employee Molly Bluejacket in their official and personal capacities. The trial court dismissed all counterclaims under the Nation's sovereign immunity.

The Smith's then filed this interlocutory appeal, asking this Court to decide questions of jurisdiction and sovereign immunity, as well as issue a writ of mandamus ordering the trial court to stay the suit until the federal district court has ruled.

**Statement of the Facts**

The Nation created the EDC in 2009, pursuant to its inherent sovereign powers, in order to promote economic development and prosperity of the Tribe. The EDC was created as a wholly owned subsidiary of the Nation and as an "arm-of-the-tribe" and was financed with a one-time, $10 million loan out of the Nation's general fund. The EDC is authorized to sue and be sued but, in order to protect the EDC and the Nation from unconsented litigation, the EDC and its employees were granted sovereign immunity. The EDC is operated by a five-member board of directors who must have business experience. Three of the board members must be members of the Nation and two must be non-Indian or members of other tribes. However, the Nation may, at any time, with or without cause, remove any director by a 75% vote.

The Nation requires the EDC to apply tribal preference when hiring its own employees as well as when contracting with outside companies and must contribute 50% of its annual net profits into the Nation's general fund. The EDC must also keep detailed corporate and financial records, and must submit them to the Tribal Council for quarterly review and approval. Finally, the EDC cannot borrow or lend money in the name or on behalf of the Nation, or permit liens or attachments on the assets of the Nation.

Before creating the EDC, the Nation signed a contract with Thomas Smith in 2007, seeking financial advice regarding economic development and how to promote the prosperity

of the tribe. Thomas Smith is a certified financial planner and accountant based out of Phoenix, Arizona, which is also where the contract was signed. After forming the contract, Thomas Smith communicated almost daily with various members of the Tribal Council and Tribal Chairs. After the EDC was created in 2009, Thomas Smith primarily communicated with EDC CEO Fred Captain and EDC employee/accountant Molly Bluejacket. Thomas Smith also presented quarterly reports to the Tribal Council in person on the reservation.

The Nation's relationship with Carol Smith began in 2010, when Thomas Smith signed a contract with her pursuant to Thomas' contract with the Nation. While the Nation never contracted specifically with Carol Smith, the Tribal Council did give written permission to Thomas Smith to make it. Carol Smith had little interaction with the Nation or EDC, having visited the reservation only twice and providing advise through Thomas Smith. Carol Smith's only direct communication with the Nation is when she submits bills to Fred Captain, and when the EDC mails her payment.

The contract between Thomas Smith and the Nation requires that he maintain absolute confidentiality about any and all communications from the Nation and economic development plans. It allowed for disputes arising from the contract to be resolved in a court of competent jurisdiction. The contract also contained a liquidated damages provision. The contract between Thomas Smith and Carol Smith required that Carol follow the terms of the contract between Thomas Smith and the Nation, and was given written permission from the Nation's Tribal Council.

In 2016, Nation, by tribal ordinance, legalized recreational marijuana. After this, EDC began pursuing the development of a marijuana cultivation and sales business, and conferred several times with Thomas Smith, without him notifying the Nation of any moral objections to

marijuana held by Thomas Smith and Carol Smith. Thomas Smith informed the Arizona Attorney General of the Nation's plans, resulting in the Arizona Attorney General then writing a cease and desist letter to the Nation regarding its marijuana development. The Nation then filed this suit.

## ARUGMENT

I. THE TRIBAL COURT GAINED PERSONAL AND SUBJECT MATTER JURISIDCTION OVER THOMAS AND CAROL SMITH WHEN THEY ENTERED A CONTRACT WITH THE NATION TO PROVIDE SERVICES PURSUANT TO ECONOMIC DEVELOPMENT.

A. The Tribal Court has Subject Matter Jurisdiction Over Thomas and Carol Smith Because They Meet Both Exceptions Provided In Montana v. United States.

When a claim arises involving contracting parties, three distinct but interrelated jurisdictional and choice of law issues may need to be addressed: (1) which courts have subject matter jurisdiction to hear a claim- tribal, state or federal; (2) which court will have personal jurisdiction over the defendant; and (3) what law governs any transaction or dispute arising between the parties? Cohens Handbook §21.02

The United States Supreme Court has repeatedly recognized the federal government's long-standing policy of encouraging tribal self-government. See Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987); Three Affiliated Tribes v. World Engineering, 476 U.S. 877, 890 (1986); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n. 5 (1982); White Mountain Apache v. Bracker, 448 U.S. 136, 143-144; Williams v. Lee, 358 U.S. 217, 220-221 (1959). Tribal courts play a vital role in tribal self-government. United States v. Wheeler, 435 U.S. 313, 332 (1978). This policy is intended to reflect the tribes' sovereignty over its members and territory, to the extent it has not been withdrawn by federal statute or treaty. United States v. Mazurie, 419 U.S. 544, 557 (1975). The question of appropriate forum for adjudicating matters

involving civil disputes between the members and non-Indians in Indian country has not been addressed by Congress. Ford Motor Co. v. Todocheenee, 258 F. Supp. 2d 1038 (D. Ariz., 2002)

Absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) In Oliphant v. Suquamish Tribe, the Court held that Indian tribes lack criminal jurisdiction over non-Indians. 435 U.S. 191 (1978). Oliphant created a general principle that tribe's sovereign powers did not extend to the activities of nonmembers of the tribe without an express provision by treaty or statute. Id. at 211-212. Montana v. United States, is the landmark case addressing a tribe's civil regulatory authority over nonmembers. 450 U.S. 544 (1981).

Montana, articulates the general rule that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation." Id. at 564. Generally, the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. Id. at 565. However, there are two instances where civil authority will extend to the conduct of nonmembers on reservations. Id. 565-566 First, a tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases or other arrangements and Secondly, a tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Id. at 565-566.

In a pair of subsequent cases, the Supreme Court applied Montana to address the scope of inherent civil adjudicative authority as well holding "as to nonmembers a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Strate v. A-1, at 453; Nevada v. Hicks, 533 U.S. 353, 357-58 (2001). The question of whether a tribe's adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction is still unanswered. Id.

1. Thomas Smith and Carol Smith entered into a consensual relationship with Yuma Indian Nation through their employment contracts, falling within the first Montana exception.

Yuma Indian Nation has jurisdiction over Thomas and Carol Smith because they fall within Montana's consensual relationship exception. Montana v. United States, pointed out two exceptions to the general rule that a tribe's inherent sovereign powers do not extend to the activities of nonmembers. 450 U.S. at 565. The first exception states that "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracting, leasing, or other arrangements. Williams v. Lee, 358 U.S. 217, 223 (1959); Morris v. Hitchcock, 194 U.S 384, 392 (1904); Buster v. Wright, 135 F. 947, 950 (1905); Washington v. Confederated Tribes of Colville Indian Reservation, 446 U.S. 134, 152-154 (1980).

Under Montana's consensual relationship exception, the relationship must be one between the nonmember and "the tribe or its members." In Macarthur v. San Juan County, the Court found that the Montana's consensual relationship exception did not apply because the contractual relationship was with a clinic, owned by the State not the tribe, was a nonmember, and not with the tribe or its members. 309 F.3d 1216 (10th Cir. 2002). Montezuma Creek Clinic is located within the boundaries of the Navajo Nation and was operated by San Juan

Health Service District to provide health care to the members of the Navajo Community. Id. at 1219. Two employees, Donna Singer and Alison Dickson, filed suit in Navajo Nation district court and United States district court. Id. One of the defendants in the suit was Truck Insurance, who had a contract for liability insurance with the Clinic. Id. The Court found that because the contractual relationship was between Truck Insurance and the Clinic, both nonmembers, Montana's consensual relationship exception could not be imposed.

Montana's, consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001). In Atkinson, petitioner is Atkinson Trading Company, who operates a business complex consisting of a hotel, restaurant, cafeteria, gallery, curio shop, retail store, and recreational vehicle facility. Id. An enlargement of the Navajo Nation Reservation resulted in the Trading Post falling within the reservations exterior borders. Id. at 648. A significant part of the business comes from tourists. Id. Respondents argued that both Atkinson Trading Co. and its hotel guest had entered a consensual relationship with the Navajo Nation justifying a hotel occupancy tax. Id. at 654. Respondents based their argument on the fact that the Atkinson Trading Co. benefits form the numerous services provided by the Navajo Nation such as the Tribal Emergency Medical Service Department and Navajo Tribal Police. Id. at 655. Nonmembers have not consented to Tribes adjudicatory authority simply by availing themselves of the benefit of tribal police protection within the reservation. Id. citing Strate, 520 U.S. at 456-457. A nonmember's consensual relationship in one area does not trigger civil authority in another; there needs to be a nexus between the relationship with the tribe and the regulation. Atkinson, at 656. Petitioners relationship in this case was with its nonmember hotel guests and therefore it can not be said to have consented to such a tax by the tribe.

Turning to the case at bar, the Yuma Indian Nation courts have subject matter jurisdiction over Thomas Smith. Thomas Smith entered into a contract with Yuma Indian Nation. (R. at 1.) Thomas agreed in the contract to provide the Nation with financial advice on an as-needed basis regarding economic development issues. There is nothing in the record to suggest that Thomas Smith is a member of the Yuma Indian Nation. In the contrary, the record states that Thomas lives and works off the reservation in Phoenix, Arizona. (R. at 1.) The court in Macarthur v. San Juan County, found that there could not be a consensual relationship because the defendant entered into a contract with another nonmember, not the tribe or its members. 309 F.3d 1216 (10th Cir. 2002). In order to comply with the first exception to Montana's general principle the contractual relationship needs to be between a nonmember and the tribe or its tribal members. Unlike the parties in Macarthur, Thomas entered a contractual relationship with the Yuma Indian Nation itself. (R. at 1.) Therefore, with Thomas Smith being a nonmember forming a contractual relationship with Yuma Indian Tribe, a portion of the first exception is met.

Thomas Smiths relationship with the Yuma Indian Nation triggers civil authority because there is a nexus between his relationship with the tribe and the contract itself. Thomas Smith agreed to provide the Nation with financial advice on an as-needed basis regarding economic development issues. (R. at 1). He exchanged phone calls with the tribal chairs and Tribal Council members on a nearly daily basis regarding economic development issues. (R. at 1). Thomas's relationship with the Nation derives from this contract. This is unlike the relationship that Atkinsons Trading Co., has with Navajo Nation which derived incidentally through the expansion of the reservation and not an agreement between the parties. Yuma

Indian Nation has jurisdiction over Thomas Smith because he entered a consensual relationship with the tribe through an employment contract.

The Nation also has subject matter jurisdiction over Carol Smith. Carol Smith is the sister of Thomas Smith who lives and works in Portland, Oregon. (R. at 2.) Thomas signed a contract with Carol Smith with the written permission of the Nation's Tribal Council. The contract she entered into with Thomas is the same contract as the one he signed with the Nation. (R. at 2.) In fact, in her contract she is required to comply with the Thomas- YIN Contract. This is distinguishable from Macarthur because the contract imposes obligations as set by the Nation against Carol, who is a nonmember.

Carol Smith's relationship with the Nation triggers civil authority because there is a nexus between her relationship with the Nation and the contract. Carol's relationship with the Nation is unlike the relationship in Atkinson, who only benefited from tribal resources. Carol was specifically retained to give advice to Thomas, the EDC, and the YIN regarding stocks, bonds, and securities. (R. at 2.) Through this relationship she submits monthly bills to the EDC CEO Fred Captain and the EDC mails her payments. Id. In addition to that Thomas forwards many of her communications and advice to the Nation's Tribal Council, Fred Captain, and accountant Molly Bluejacket. Id. Yuma Indian Nation has subject matter jurisdiction over Carol Smith because she entered into a consensual contractual relationship with the Nation meeting the first exception to the general principles of Montana.

2. Thomas Smith and Carol Smith's conduct has a direct effect on the economic security and the health and welfare of the Yuma Indian Nation, falling within the second Montana exception.

The Nation has jurisdiction over Thomas Smith and Carol Smith because their conduct has a direct effect on the economic security of the tribe. Montana v. United States, pointed out

two exceptions to the general rule that a tribe's inherent sovereign powers do not extend to the activities of nonmembers. 450 U.S. at 565. The second exception states that a tribe may "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Fisher v. District Court, 424 U.S. 382, 386 (1976); Williams v. Lee, 358 U.S. 217, 220 (1959); Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-129 (1906); Thomas v. Gay, 169 U.S. 264, 273 (1898).

In Montana v. Untied States, the court found that nothing in the case suggested that such non-Indian hunting and fishing so threaten the Tribe's political economic security as to justify tribal regulation. 450 U.S. 544, 566 (1981). In the case at hand, the claim arises from a breach of contract surrounding economic development. Therefore, by breaching that contract the Smiths directly effect the economic security of the Nation.

B. The Yuma Indian Nation has personal jurisdiction over any person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action or contract.

In order for a tribal court to a hear a case, it must have both subject matter jurisdiction and personal jurisdiction over the defendant. 1-7 Cohen's Handbook of Federal Indian Law §7.02 [2] In addition to the Montana line of cases limiting the legislative and adjudicative jurisdiction over Indian nations, the Indian Civil Rights Act (ICRA) imposes a statutory version of the due process clause on tribal courts. Id. Tribal courts are obligated under federal law to determine whether they have personal jurisdiction over defendants in their court. Id. Nevertheless, tribal courts often consult Supreme Court precedents to define the parameters of personal jurisdiction. Id. The basic requirement of personal jurisdiction is that a court may not make a binding judgment against an individual with whom the forum "has no contacts, ties or

relations." Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945). If a defendant is not present within a territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Id. Personal jurisdiction may be general or specific. 1-7 Cohen's Handbook of Federal Indian Law §7.02.

General jurisdiction exists over the defendant for claims that arise in the forum if the defendant arises in the forum or conduct continuous and systematic business activities there such that the defendant is at home. Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014). Specific jurisdiction exists for the claim alleged in the suit if the defendant "purposefully avails itself of the privilege of conducting activities within the forum state." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

An individual is subject to specific jurisdiction for claims in which the defendant purposefully avails itself. In Burger King Corp. v. Rudzewicz, a Florida corporation with principal offices in Miami brought an action in the District Court of Florida against, two franchisees, both residents of Michigan. 471 U.S. 464 (1985) The State of Florida's long-arm statute extends jurisdiction to "any person, whether or not a citizen of the state by failing to perform acts required by the contract to be performed in this state." Id. at 463. The franchisees were told to vacate the franchise premises after they had been sent notices of default. Id. at 468. After the franchisees refused to leave, Burger King brought suit. The court requires that an individual have "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign." Id. at 472 citing Shaffer v. Heitner, 433 U.S. 186, 218 (1977). This fair warning requirement is satisfied when the defendant has "purposefully directed" his activities at residents of the forum and the litigation results from alleged injuries that arise out

of or relate to those activities. Id. citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984). When looking at factors such as prior negotiations and future consequences, along with the terms of a contract and the parties actual course of dealing a court can determine that an individual has purposefully established minimum contacts within the forum. Burger King, 471 U.S. at 479. Evidence in Burger King suggests that the defendant knew he was affiliating himself with an enterprise based primarily in Florida. Id. at 478. The contract documents themselves emphasized the supervision was from the Miami headquarters. Id. at 481 There was also a continuous course of direct communications by mail and by telephone with the Miami headquarters. Id. A choice-of-law provision is also relevant when the defendant has purposefully invoked the benefits and protections of a States. Id. at 482. The Court found that the franchisee had established a substantial and continuing relationship with Burger King's headquarters, received fair notice from the contract documents and through his dealing with the franchise that he might be subject to suit in Florida, therefore the District Court has personal jurisdiction. Id. at 487.

Turning to the case at bar, the Yuma Indian Nation has personal jurisdiction over both Thomas Smith and Carol Smith. Specific jurisdiction applies to both Thomas and Carol because they have purposefully availed their selves to the benefit of conducting business within the Nation's borders. The Nation's Code states that:

> subject to any limitations stated elsewhere in this Code, the Court of the Tribe shall have jurisdiction over the following persons:
>
> a. Any person who transact, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative, for any civil cause of action or contract or in quasi contract or by promissory estoppel or alleging fraud.

Code 1-104. The Nation's Code is similar to the long-arm statute in Burger King. Thomas and Carol Smith both signed contracts with the Nation. (R. at 1, 2.) When Thomas signed his contract in 2007 it provided for any and all disputes arising from the contract to be litigated in a court of competent jurisdiction. (R. at 1.) In 2010, Carol was given and signed an identical contract. (R. at 2). The Court only requires that an individual have a fair warning that they might be subject to jurisdiction in a foreign sovereign. Burger King 471 U.S. at 472; citing Shaffer, 433 U.S. at 218. By signing the contracts, both Thomas Smith and Carol Smith were put on notice that they could be subject to suit in this Court.

In Burger King, the court found that a contract alone was not enough to show that an individual has established sufficient minimum contacts with a forum state. 471 U.S. 462, 482 (1985). However, when a contract was coupled with the individual purposefully directing their activities on residents of the forum and the litigation resulted from those activities, sufficient minimum contacts were established. Id. Thomas directed his business activities on the Nation from 2007 to 2017 while he was providing them with financial advice on a wide range of economic development issues. (R. at 1). Thomas primarily communicated with Fred Captain the EDC CEO and EDC accountant Molly Bluejacket. (R. at 1.) Furthermore, Thomas prepared and submitted to the YIN Tribal Council written reports on a quarterly basis and in person at Council meetings on the reservation. (R. at 1.) Thomas has established a substantial and continuing relationship with the Nation through EDC and received fair notice from the contract that he might be subject to suit in Yuma Indian Nation courts. Burger King, 471 U.S. at 487.

Carol signed the same contract as Thomas. (R. at 2). She then began to submit monthly bills via email to the EDC CEO Fred Captain and the EDC mails her payments. Id. While she did not visit the reservation on a continued basis as Thomas had, she still visited the reservation

with her brother on two occasions. Id. In Burger King, the court found that while the franchisee had never visited headquarters he had established a substantial and continuing relationship with headquarters and that was enough to avail himself to the states courts. Id. at 479. While Carol has not frequented the Nation as much as Thomas, she has established a substantial and continuing relationship with the Nation through EDC and received fair notice from the contract that she might be subject to suit in Yuma Indian Nation courts.

## II. SOVEREIGN IMMUNITY PROTECTS THE YUMA INDIAN NATION, THE ECONOMIC DEVELOPMENT CORPORATION, CEO FRED CAPTAIN, AND MOLLY BLUEJACKET FROM SUIT

### A. The Nation's Code Protects the Nation, the EDC, Fred Captain, and Molly Bluejacket From the Smiths' Counterclaims in this Court because No Waiver of Immunity Has Been Given.

In civil cases, this Court first applies the Nation's Constitution, statutes, and common law. 2-111(1)(A). Only when a dispute is not covered by the Nation's Constitution, statutes, or common law may this Court apply U.S. law. 1-109. Tribal laws are to be "liberally construed to promote their object." 2-104. The Nation, its officers, and its employees are immune from suit in any civil action unless expressly waived by a Tribal resolution. 1-919. The Nation has expressly granted sovereign immunity to corporations it wholly owns. 11-1003 Subdivision 3. Wholly owned corporations only waive sovereign immunity when waiver is given (1) explicitly (2) in a written contract or commercial document and (3) is specifically approved by the corporation's board of directors. 11-1003 Subdivision 3(a). 1-919. The Nation has preserved sovereign immunity and has not given consent to be sued throughout the Code. 1-110(2); 1-918; 2-106; 2-906; 11-081; 11-161 Subdivision 26.

The Code is clear that in "actions by or against [the] Tribe," the Nation is immune from suit "[u]nless specifically waived by a resolution adopted" by the Nation. 1-919. The Nation has not, by resolution, expressly waived immunity from suit. However, the contracts between

the Nation and the Smiths, "provided for any and all disputes arising from the contract to be litigated in a court of competent jurisdiction," and contained liquidated damages provision. (R. at 1, 3.) Despite those provisions, this Court is bound to construe Code 1-919 to promote its objective. 2-104. Because the requirements of 1-919 have not been met, this Court should construe the Code to promote its objective and find that the Nation's sovereign immunity in intact.

If this Court finds that the Nation implied a waiver of its sovereign immunity in this Court by agreeing to litigate disputes in a court of competent jurisdiction, agreeing to the liquidated damages provision, and filing suit, the Smiths' claims are beyond any possible implied waiver. It is clear that the Nation intended to litigate and resolve the issue of the Smiths' breach of contract and violation of their confidentiality and fiduciary duties by bringing suit. (R. at 3.) For relief, the Nation is only seeking "recovery of the liquidated damages amount set out in the contracts." (R. at 3.) However, the Smiths are suing for "monies due under their contracts and for defamation for impugning their professional skill." (R. at 3.) In other words, the Smiths are asking for a different relief, which is outside of the contract, and requires the resolution of separate issues. (R. at 3.) The Nation cannot be found to have impliedly waived its immunity from these independent counterclaims because that would run counter to the purpose of the Nation's attempts to preserve sovereign immunity. 2-104.

Regardless of whether or not this Court finds that the Nation is protected by sovereign immunity, the Economic Development Corporation (EDC) still retains its immunity. The Nation grants sovereign immunity to entities it owns. 11-1003 Subdivision 3. The EDC is a "wholly owned subsidiary of the Nation" (R. at 1,) and was specifically granted sovereign immunity to protect it "and the Nation from unconsented litigation. . . ." (R. at 2.) In order to

waive sovereign immunity, the Nation requires that entities do so (1) explicitly, (2) in a written contract or commercial document to which the corporation is a party, and (3) with specific approval by the corporation's board of directors. 11-1003 Subdivision 3(a). The EDC has done none of these. (R. at 1-2.) The EDC never explicitly waived its immunity to the Smiths. (R. at 1-3.) The Smiths did not have a contract with the EDC. (R. at 1, 2.) Thomas Smith's contract is with the Nation and pre-dates the existence of the EDC. (R at 1.) Carol Smith's contract is with Thomas Smith and only references the contract with the Nation. (R. at 2.) The EDC never created a commercial document waiving immunity. (R. at 1-3.) The EDC's board of directors never gave specific approval to waive immunity from suit by the Smiths. (R. at 1-3.) Quite to the contrary, the Nation specifically protected the EDC with sovereign immunity to "protect the entity and the Nation from unconsented litigation." (R. at 2.) Once again, this Court is bound to construe laws to promote their objective. 2-104. The Nation clearly set out conditions for when a corporation may waive its immunity. 11-1003 Subdivision 3. Because the EDC's immunity has not been waived, the EDC is shielded from suit by the Smiths.

Similarly, EDC CEO Fred Captain and EDC accountant Molly Bluejacket are protected from suit by sovereign immunity. The Nation protects officers and employees of the Nation unless immunity is waived by specific resolution. 1-919. The Nation specifically protected the EDC's employees with sovereign immunity at its formation. (R. at 2.) Just as with the EDC itself, the Nation has expressed clear intent to shield EDC employees from suit, intent which this Court is bound to give deference to. 2-104. The Nation has not defined the difference between official and personal capacity suits, so this counterclaim will be analyzed later.

Clearly, under the laws of the Nation, sovereign immunity blocks all of the Smiths' compulsory counterclaims. Sovereign immunity has not been specifically waived in a

resolution by the Nation as required by 1-919. The EDC has not waived its immunity from suit. And finally, the Nation nor the EDC have authorized suit against their employees. However, because this is the first time this Court has addressed the issue of sovereign immunity in contract counterclaims, this brief will also provide analysis under Federal common law.

The U.S. Supreme Court, Federal courts, and State courts have all addressed the issue of Tribes waiving sovereign immunity. By providing their analysis, this Court will have further evidence that the Smith's counterclaims are entirely barred by sovereign immunity. Of course, this Court is not bound by other courts' decisions, but "may apply" other courts' rationale when an issue is "not covered by the Tribal Constitution, Tribal statute, or Tribal common law . . . ." 1-109.

B. U.S. Federal Court Decisions Affirm that the Nation is Protected from the Smiths' Counterclaims by Its Sovereign Immunity Because the Nation Did Not Waive Immunity, One Can Not Be Implied, and Recoupment Does Not Apply.

Tribes possess common-law immunity from suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). A Tribe's immunity applies to suits for damages and injunctive relief. see Imperial Granite Co. v. Pala Band of Mission Indians, 423 F.3d 1101, 1114 (9th Cir. 2005). A Tribe's sovereign immunity protects it from suits over contracts both on and off the Tribe's reservation. Kiowa Tribe v. Mfg. Techs., Inc., 1705 (1998). A Tribe maintains its immunity even when it allegedly acts beyond its powers. Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1052 (9th Cir.), *rev'ed on other grounds*, 474 U.S. 9 (1985). Suit by a Tribe can show only a willingness to adjudicate a particular issue. McClendon v. United States, 885 F.2d 627, 630 (9th Cir. 1989). A Tribe maintains its immunity from counterclaims when bringing suit. Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 773-74 (D.C. Cir. 1986). Tribes can waive their sovereign immunity in contract, but it must be "clearly" done. see Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S.

505, 509-510 (1991). Liquidated damages are valid limits on recovery and suit. Council Bros., Inc. v. Ray Burner Co., 473 F.2d 400, 406 (5th Cir. 1973). Congress can abrogate sovereign immunity but it "cannot be implied but must be unequivocally expressed." Santa Clara, 436 U.S. at 58 (quoting United States v. Testan, 424 U.S. 392, 399 (1976)).

Sovereign immunity applies equally to governmental and commercial contracts regardless of where contracts are made. In Kiowa Tribe v. Mfg. Techs., a Tribe defaulted on a promissory note issued to the respondent. 118 S. Ct. 1700, 1702 (1998). The note was signed on trust land, but executed, delivered, and required payments off the reservation. Id. The note also stated that: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." Id. The U.S. Supreme Court held that the Tribe's sovereign immunity protected it from suit because the Tribe had not waived its immunity and because Congress had not abrogated the Tribe's immunity for commercial, off-reservation activity. Id. at 1705.

A Tribe does not waive its sovereign immunity to counterclaims when filing suit. In Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, the Tribe sued a State in federal court after the State attempted to collect taxes on cigarette sales. 498 U.S. 505, 507 (1991). The State counterclaimed, asking the court to enforce the tax claim and enjoin the Tribe from future sales without collecting taxes. Id. at 507-08. The U.S. Supreme Court upheld the Tribe's sovereign immunity, rejecting arguments that sovereign immunity was waived by compulsory counterclaims. Id. at 509.

A Tribe does not waive immunity to related issues when bringing suit. In McClendon, the United States and a Tribe had previously brought suit to determine ownership of lands occupied by non-Tribal-members. 885 F.2d at 628. The parties settled, determining that the Tribe and the U.S would have undisputed title to the land and the non-members would receive

a favorable, long-term lease. Id. Later, after being assigned a portion of the settlement lease and the Tribe withdrawing previously issued permits, McClendon brought suit over the terms of the lease. Id. at 629. The court held that by bringing the original suit, "the Tribe accepted the risk that it would be bound by an adverse determination . . . ." Id. at 630. However, the court found that the Tribe's waiver of immunity from suit was "limited to the issues necessary to decide the action brought by the tribe" and did not show the Tribe's consent to be sued over the terms of the lease. Id.; see also United States v, Sherwood, 312 U.S. 584, 586 (1941) (holding a sovereign's consent to be sued defines a court's jurisdiction to entertain the suit).

Specific arbitration and choice-of-law clauses, drafted by a Tribe, show a limited waiver of sovereign immunity. In C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., the U.S. Supreme Court found a waiver of sovereign immunity within a contract between a Tribe and a construction company on a tribally-owned building off the reservation. 532 U.S. 411, 414-15 (2001). The contract contained an arbitration clause that stated a choice of arbitration rules and that any "award rendered by the arbitrator . . . shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." Id. at 415. The contract also contained a choice-of-law clause, reading: "The contract shall be governed by the law of the place where the Project is located." Id. The U.S. Supreme Court found that the express clauses, along with the fact that the Tribe prepared the contract, showed that the Tribe clearly consented to arbitration and enforcement in state court. Id. at 423.

As shown in Kiowa, it is irrelevant that the Nation undertook commercial endeavors, some parts of which took place off the reservation, when contracting with the Smiths. Kiowa, 118 S. Ct. at 1702; (R. at 1.) It is also clear that the Nation has not "expressed unequivocally"

any waiver of immunity because there is nothing on the record showing such a waiver. Santa Clara, 436 U.S. at 58; see 1-919 (requiring that waivers of immunity be specifically passed by resolution). This Court can assume that the Nation waived its immunity only as "necessary to decide the action brought by" the Nation. McClendon, 885 F.2d at 630. However, this Court should not assume that the Nation's waiver extends to the Smiths' counterclaims. Potawatomi, 498 U.S. at 510 (holding that compulsory counterclaims to not defeat sovereign immunity); McClendon, 885 F.2d at 630 (holding that a Tribe's waiver from bringing suit is not broad enough to cover related matters arising from the same set of facts). This means that this Court would need to find an implied waiver in the contract language with Thomas Smith which also extends to Carol Smith. (R. at 1, 2.)

When the U.S. Supreme court has found implied waivers, it has done so through much more explicit language, which was drafted by the Tribe. Unlike the Tribe in C & L, the Nation did not agree to specific arbitration rules, did not agree to make any arbitration decision binding in any court of law, and did not agree to a choice-of-law clause, and was not responsible for drafting the provisions. 532 U.S. at 415. The Nation only agreed to litigating disputes in a "court of competent jurisdiction" and to a liquidated damages provision. (R. at 1, 3.) A liquidated damages provision is a clear "exclusive limitation" on damages. Council Bros., Inc. v. Ray Burner Co., 473 F.2d 400, 406 (5th Cir. 1973); see also 5 Corbin on Contracts § 1061, at 353 (1964). This Court is a court of competent jurisdiction and the Nation is seeking recovery only under the liquidated damages provision. 1-201; 1-202; (R. at 3.) The Nation has agreed to adjudication of the "particular controversy" of whether the Smiths' breach and violations of their duties entitle the Nation to recovery of liquidated damages under the contract. McClendon v. United States, 885 F.2d 627, 630 (9th Cir. 1989).

However, the Smiths are counterclaiming for monies due under the contract and for defamation. (R. at 3.) Like adjudicating the terms of a lease in McClendon, the mere fact that the "matters arise from the same set of underlying facts" is not enough for the Smiths to claim a waiver of immunity to counterclaims by the Nation. 885 F.2d at 630. Further, just as in Potawatomi, the fact the Smiths' counterclaims may be compulsory under the Code is not enough to defeat the Nation's immunity. 498 U.S. at 509-10 (holding that compulsory counterclaim did not constitute waiver of immunity); 2-214(1) (defining compulsory counterclaims as arising out of the same transaction or occurrence and does not require presence of parties beyond this Court's jurisdiction). Because the Smiths' counterclaims are beyond the scope of the Nation's suit, and because U.S. courts affirm that the Smiths' counterclaims are beyond any implied waiver from the Nation bringing suit, the Smiths' counterclaims are barred by sovereign immunity.

This Court and the Nation have not defined claims sounding in recoupment, and as such, is not bound to consider whether it defeats the Nation's immunity. 1-109. However, U.S. courts have found limited waivers of immunity in such claims, so this Brief will address the issue. "Claims in recoupment arise out of the same transaction or occurrence, seek the same kind of relief of the plaintiff, and do not seek an amount in excess of that sought by the plaintiff." Berrey v. Asarco Inc., 439 F.3d 636, 643 (2006). Damages, wrongful action by filing suit, and breach of contract stemming from suit do not sound in recoupment. Jicarilla Apache v. Andrus, 687 F.2d 1324, 1345 (10th Cir. 1982).

The Smiths' counterclaims do not sound in recoupment. The Tribe's claims and Smiths' claims do not arise from the same transaction or occurrence: The Tribe is suing over the Smith's breach and violations of their duties while the Smiths' suit seems to be solely in

response to the suit by the Tribe, just as the defendants claimed wrongful action from the Tribe bringing suit in Jicarilla. (R. at 3.); 687 F.2d at 1345. The Smiths' do not seek the same relief as the Tribe: liquidated damages. (R. at 3.) This difference is clear because liquidated damages exclude other forms of relief. Council Bros., 473 F.2d at 406. The record does not contain amounts sought by either party in order to fully answer the third element, but it is a fair assumption that the Smiths seek more than provided by the liquidated damages provision, otherwise they would simply seek that for recovery as it has already been agreed to by the Nation. (R. at 3.) Because the Smiths' counterclaims cannot meet any element to sound in recoupment, this cannot be used to defeat the Nation's sovereign immunity.

From this, this Court should be assured that the Nation retains its sovereign immunity from the Smiths' counterclaims. However, the Smiths have also brought their counterclaims against the EDC. Like the Nation, the EDC clearly retains its sovereign immunity under the laws of the Nation, but would also have immunity under tests applied by Federal courts.

C. U.S. Courts Affirm That the EDC is Protected by the Nation's Sovereign Immunity Because the EDC is Sufficiently Close to the Tribe that Judgments Against the EDC Run Against the Nation.

This Court should follow the test, established in the Code 11-1003 Subdivision 3(a), for determining that the EDC has not waived its immunity. (R. at 2.) However, to provide a more thorough analysis, this Brief will examine the EDC's immunity utilizing tests implemented by Federal courts. The U.S. Supreme Court has not established a test for determining when an entity is protected by a Tribe's sovereign immunity. Wright v. Colville Tribal Enter. Corp., 147 P.3d 1275, 1283 (Wash. 2006). Tribal sovereign immunity extends to Tribal entities engaged in economic development when the relationship between the Tribe and the entity is sufficiently close. Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1183 (10th Cir. 2010). Arm-of-the-Tribe entities have sovereign

immunity. Allen v. Gold Country Casino, 464 F.3d 1044, 1047 (9th Cir. 2006). Multiple tests exist in Federal and State courts for determining when a Tribally owned entity qualifies for sovereign immunity. The 10th Circuit uses a six-factor test: (1) method of creation; (2) purpose; (3) structure, ownership, and management; (4) Tribal intent to give immunity; (5) financial relationship between the tribe and the entities; and (6) whether purposes of tribal sovereign immunity are served by granting immunity to the entity. Breakthrough, 629 F.3d at 1187. This balancing test is considered the "most comprehensive" and has been used by other Circuits. Howard v. Plain Green, LLC, 2017 U.S. Dist. LEXIS 137229, 7-8 (E.D. Va. Aug. 7, 2017).

Language used by a Tribe when creating an entity can show that the entity is entitled to sovereign immunity. When creating entities, a Tribe noted that it was creating them under the authority of its constitution, and described them as "wholly owned unincorporated enterprise[s] of the Tribe . . . ." Breakthrough, 629 F.3d at 1192. The court found this language "naturally suggests... a close relationship to the Tribe." Id.; see also Everette v. Mitchem, 146 F. Supp. 3d 720, 724 (D. Md. 2015) (holding entity "organized and chartered under the laws" of the Tribe met first factor).

Tribal entities that are created to engage in economic development and contribute revenue to the Tribe may have sovereign immunity. A Tribal entity engaged in gaming contributed 50% of revenue to support Tribal governmental functions. Breakthrough, 629 F.3d at 1192-93. This revenue was used for education, providing services for children and elders, and Tribal self-sufficiency. Id. at 1193. Because the entity was supporting government programs, the entity was able to claim sovereign immunity. Id.: see also J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd., 842 F. Supp. 2d 1163, 1176 (holding entity created

by multiple Tribes to act as a formal representative to Federal government and provide health care services to tribes was governmental function).

Tribal entities may have a mix of Tribal control and autonomy from the Tribe while still retaining sovereign immunity. In Breakthrough, the entity had its own board of directors made up of a mix of Tribal members and non-members. 629 F.3d at 1193. This was not enough to defeat sovereign immunity. Id. at 1181.

Explicitly granting sovereign immunity in an entity's founding documents and authorizing entity to waive sovereign immunity shows Tribe's intent. In Breakthrough, the Tribe "clothed" the entity with sovereign immunity, and authorized the entity to waive immunity when "necessary, in the best business judgment of the Board of directors, to secure a substantial advantage or benefit for the [entity] or the Tribe." Id. at 1193-94. The Tribe also required that the entity make any waiver specifically. Id. at 1194. see also Everette, 146 F. Supp. 3d at 725.

Payment obligations and Tribal reliance on revenue show that an entity is entitled to immunity, while failure to meet payment obligations does not impact immunity. In Breakthrough, the entities were required to make monthly minimum payments to the Tribe. 629 F.3d at 1194. However, the Tribe had missed several payments without adverse consequences. Id. Despite this, the Tribe would still be affected by any adverse judgment. Id. at 1195. Because of this, judgement went against the tribe itself, showing that the entity was entitled to sovereign immunity. Id.

Promoting economic development and supporting governmental functions through revenue generation and diversifying economic development supports the overall purposes of self-determination and supports an entity's sovereign immunity. In Breakthrough, the entities

revenue generation through a casino so "plainly promote and fund the Tribe's self-determination" that extending sovereign immunity to the entities protects the Tribe itself. Id. at 1195.

The EDC meets all six of the Breakthrough factors and is covered by the Nation's sovereign immunity. The EDC obviously meets three of the factors, so those will be discussed briefly. The Nation has clearly expressed intent to protect its entities generally in the Code 11-1003 Subdivision 3, and specifically when creating the EDC "pursuant to [the Nation's] inherent sovereign powers" by using similar language and methods of creation as the Tribe in Breakthrough. (R. at 1-2.); 629 F.3d at 1191-92. Next, the EDC was created to "promote the prosperity of the Nation and its citizens," and must contribute 50% of annual net profits to the general fund of the Nation (R. at 1-2.) A purpose of promoting economic prosperity has been held to weigh in favor of immunity. Breakthrough, 629 F.3d at 1192; see also Plain Green, 2017 U.S. Dist. LEXIS 137229, 9-10. The Nation clearly intended to grant the EDC sovereign immunity, and set clear conditions for how the EDC may waive it. (R. at 2.); 11-1003 Subdivision 3; Breakthrough, 629 F.3d at 1193-94 (intent shown from charter language "clothing" entity in immunity and how it may be waived).

The EDC's management and oversight by the Tribal Council show that the EDC is entitled to immunity. As in Breakthrough, the EDC's board is made up of members and non-members. 629 F.3d at 1193; (R. at 1.) Going beyond that, however, the EDC is "required to keep detailed corporate and financial records and submit them" to the Council "for review and approval," and the Council can remove a director, with or without cause, at any time by 75% vote. (R. at 1-2.) This control goes beyond that seen in Breakthrough, and shows that the EDC is entitled to immunity.

In Breakthrough, the entity was supposed to give 100% of its revenue to the Tribe and make minimum monthly payments. 629 F.3d at 1194-95. However, the EDC only contributes 50% of revenue and does not have minimum payment. (R. at 2.) Despite this disparity, any adverse judgement against the EDC would run against the Tribe because the EDC is $8 million in debt to the Tribe. (R. at 2.) Like in Breakthrough, where the entity was also behind on payments to the Tribe, "any reduction in the [entity's] revenue that could result from an adverse judgment against it would therefore reduce the Tribe's income." Id. at 1195.

The EDC also meets the sixth factor of advancing the overall purposes of tribal sovereign immunity. Congress and the Nation's shared policy of economic development to support Tribal sovereignty is advanced by the EDC's goal of economic development, tribal employment through preferential hiring policies, and economic diversification through development of other businesses. (R. at 1, 2.) These goals are similar to the Nation's goals that the EDC's "activities are properly deemed to be those of the tribe." Breakthrough, 629 F.3d at 1195.

The EDC clearly meets all six of the comprehensive Breakthrough factors, and enjoys a sufficiently close relationship with the Nation as to enjoy sovereign immunity. However, when creating the EDC, the Nation authorized it to sue and be sued. (R. at 2.) If this Court does not find the fact that the EDC has not met the waiver standards set out in 11-1003 to be conclusive, U.S. Federal courts agree that more is required to show an implied waiver. Clauses allowing Tribal entities to sue or be sued are limited to actions of the entity and do not extend to actions of the Tribe as a political body. Ute Distribution Corp. v. Ute Indian Tribe, 149 F.3d 1260, 1268 (10th Cir. 1998). Sue or be sued clauses must be present in contracts between the

Tribal entity and a 3rd party to waive the Tribal entity's sovereign immunity. Dillion v. Yankton Sioux Tribe Hous. Auth., 144 F.3d 581, 584 (1998).

When a tribal entity is authorized to sue or be sued, that entity only waives sovereign immunity when specifically contracting to do so with a 3rd party. In Dillion v. Yankton Sioux Tribe Housing Authority, a non-Tribal-member, who was employed by the Tribal Housing Authority, brought suit after being fired. 144 F.3d 581, 582 (8th Cir. 1998). The Tribal Resolution creating the Authority stated:

> The Committee hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have, but the Tribe shall not be liable for the debts or obligations of the Authority. Id. at 582-83.

Because there was no contract waiving sovereign immunity, and because the Authority could not have waived immunity though an implied agreement, the Authority was protected by sovereign immunity. Id. at 584.

Similarly, the Nation has only authorized the EDC to consent to suit. 11-1003 Subdivision 3. The EDC does not have a contract with the Smiths. (R. at 1, 2.) The EDC did not bring suit against the Smiths. (R. at 3.) Because the EDC was only authorized to be sued, but had not actually waived immunity from suit, as in Yankton Sioux Tribe, the EDC is immune from the Smiths' counterclaims. 144 F.3d at 582; 11-1003.

It is clear that the EDC meets all the factors within the Breakthrough balancing test to show that the EDC is sufficiently close to the Nation to be protected by sovereign immunity. The Smiths are also bringing their claims against EDC CEO Fred Captain and EDC accountant Molly Bluejacket in their official and personal capacities. However, these claims are also barred by sovereign immunity.

D. Sovereign Immunity Protects Fred Captain and Molly Bluejacket because They Were Acting Entirely Within their Official Capacities and Are Only Nominally Named in Their Personal Capacities

It is clear that Mr. Captain and Ms. Bluejacket are immune from the Smiths' counterclaims in their official capacities. Aside from the Nation granting sovereign immunity to Mr. Captain and Ms. Bluejacket as employees of the EDC, generally granting immunity to employees in the Code, the U.S. Supreme Court has recognized that official capacity suits are barred by sovereign immunity. Lewis v. Clarke, 137 S. Ct. 1285, 1292 (2017). As such, the Smiths' claims against Mr. Captain and Ms. Bluejacket in their official capacities are barred by immunity.

However, the Smiths are also barred by sovereign immunity from bringing suit against Fred Captain and Molly Bluejacket in their individual capacities. The Nation has not Codified the distinction between individual and official suits, but this Court may look to the recent U.S. Supreme Court ruling in Lewis v. Clarke, 137 S. Ct. 1285 (2017).

Lewis v. Clarke involved an automobile accident between an employee of the Tribe, working as a diver while off the reservation, and a non-Tribal-member family. Id. at 1287. In that opinion, the U.S. Supreme Court held that the difference between the two types of suit is that "the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." Id. at 1292. The U.S. Supreme Court held that, because the suit arose from a tort committed by the driver's own negligence, the Tribe would not be "legally bound by the court's adverse judgment . . . ." Id. at 1294.

If this Court chooses to apply the Lewis court's rationale, the Court will see that the Smiths' counterclaims against Mr. Captain and Ms. Bluejacket in their personal capacity are truly against the Nation. In Lewis, the tort occurred solely because of the driver's negligence. Id. at 1287. However, the Smiths' only interactions with Mr. Captain and Ms. Bluejacket

occurred in the form of communication with Thomas Smith (R. at 1,) and receiving bills from Carol Smith (R. at 2.) The record does not show any tort or negligence committed by Mr. Captain or Ms. Bluejacket against the Smiths. The record shows that the Nation passed an ordinance legalizing marijuana and that the EDG began pursuing development. (R. at 2.) After that, and after conferring with the Nation several times without complaint, the Smiths breached their contract with the Nation because of "moral reasons" against marijuana. (R. at 2.) The only potential defamation of the Smiths' professional skills that can be found in the record is the fact that the Nation brought suit against the Smiths. (R. at 3.) Since Mr. Captain and Ms. Bluejacket only acted in their authorized capacities with the Smiths, and because neither Mr. Captain or Ms. Bluejacket committed a tort or negligence against the Smiths, the Smiths' counterclaims are actually against the Nation and Mr. Captain and Ms. Bluejacket are protected by sovereign immunity.

## CONCLUSION

In conclusion, this Court should find that the trial court has personal and subject matter jurisdiction over Thomas Smith and Carol Smith because both of the Montana exceptions apply to their relationship with the Nation. Their contracts showed that they were availing themselves of the Nation's jurisdiction and their work, supporting the Nation's economic development, has a significant impact on the Nation. This Court should also find that the Smiths' counterclaims are entirely barred in Tribal Court because none of the conditions for waiver of immunity, as required by the Nation, have been met. Further, under Federal court analysis, the Nation, the EDC, CEO Fred Captain, and EDC employee Molly Bluejacket are all protected by sovereign immunity.